Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DOROTHY E. MEGGERS, JAMES C. EWIN, and DOROTHY C. EWIN,

Petitioners,

v.

EXXON COMPANY U.S.A., WILLIAM A. PERDUE, CHEL GOLANSKY, and MARK I. HOLLAND,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This petition raises the issue of the constitutionality of a state statute, Virginia Code § 8.01-230, which provides in cases of damage to property that the limitations period begins to run when "breach of duty occurs" and not when the right of action accrues. The Virginia courts held that this statute time-barred petitioners' common law nuisance and trespass claims for damages for underground gasoline contamination prior to the date petitioners were even damaged and prior to the existence of any Virginia common law cause of action.

1. Whether Virginia Code § 8.01-230 as applied to petitioners' claims of common law nuisance and trespass constitutes a taking of private property without compensation and for private use in violation of the due process clause of the Fourteenth Amendment of the United

States Constitution, in that petitioners received no compensation for property rights transferred to Exxon without their knowledge or consent.

2. Whether Virginia Code § 8.01-230, which bars the landowners' current and future claims for trespass and nuisance, violates due process rights guaranteed by the Fourteenth Amendment of the United States Constitution by depriving landowners of protected property interests, where the statute of limitations expired before such claims accrued and failed to provide a reasonably adequate period of time for filing suit, and where, as here, no legitimate state objective is implicated for protecting tortfeasors who conceal discharge of gasoline.

3. Whether the Virginia statute of limitations, as applied to petitioners'

claims of trespass and nuisance, violates petitioners' right to equal protection of the law provided by the Fourteenth Amendment of the Uunited States Constitution.

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SUPREME COURT OF THE UNITED STATES

October Term 1993

No.

DOROTHY E. MEGGERS, JAMES C. EWIN, and DOROTHY C. EWIN,

PETITIONERS,

v.

EXXON COMPANY U.S.A., WILLIAM A. PERDUE, CHEL GOLANSKY, and MARK I. HOLLAND,

RESPONDENTS.

Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

Petitioners Dorothy E. Meggers, James C. Ewin, and Dorothy C. Ewin pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Virginia, entered on January 7, 1994, denying reconsideration of the Court's Order denying review issued on November 3, 1993.

DECISIONS BELOW

The Supreme Court of Virginia denied Petition for Appeal on November 3, 1993. This Order is unreported and is reprinted in Appendix A hereto at 1a.

The Supreme Court of Virginia denied the Petition for Rehearing on January 7, 1994. This Order is unreported and is reprinted in Appendix B hereto at 2a.

The Circuit Court of Arlington County, Virginia, entered Final Order of Dismissal with prejudice on April 30, 1993. This Order is unreported and is reprinted in Appendix C hereto at 3a.

The Circuit Court of Arlington County, Virginia, entered an Order denying Petitioners' Motions for Reconsideration on May 21, 1993. This Order is unreported and is reprinted in Appendix D hereto at 7a.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The judgment sought to be reviewed was initially entered on November 3, 1993, by the Supreme Court of Virginia. The denial of request for a rehearing was entered January 7, 1994. The statutory provision conferring jurisdiction on this Court to review the judgment by Writ of Certiorari is U.S.C. § 28-1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Fourteenth Amendment, Section 1, second sentence:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

> jurisdiction the equal protection of the laws.

Virginia Code § 8.01-230 provides:

> In every action for which a limitation period is prescribed, the cause of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person, when the breach of contract or duty occurs in the case of damage to property and not when the resulting damage is discovered, except where the relief sought is solely equitable or where otherwise provided under § 8.01-233, subsection C of § 8.01-245, §§ 8.01-249, 8.01-250 or other statute.

(Emphasis added.)

Virginia Code § 8.01-243(B) provides:

> Every action for injury to property, including actions by a parent or guardian of an infant against a tort-feasor for expenses of curing or attempting to

> cure such infant from the result of a personal injury or loss of services to such infant, shall be brought within five years after the cause of action accrues.

(Emphasis added.)

STATEMENT OF THE CASE

A.

Under Virginia law, a statute of limitations does not begin to run until a right of action accrues, and damages or injury is an essential element of a right of action in trespass or nuisance.

Effective October 1, 1977, the Virginia legislature recodified the state statutes dealing with procedure in the Virginia courts and, in the process, amended the provision governing the accrual of causes of action. Section 8.01-230 was changed to provide that in cases involving damage to property the

statute of limitations can expire before there is any injury giving rise to a right of action.

On March 15, 1991, petitioners Dorothy Ewin Meggers, James L. Ewin, and their ninety-three year old mother, Dorothy C. Ewin, filed suit in the Circuit Court of Arlington County, Virginia, against Exxon Company U.S.A. and other former owners and operators of an Exxon retail gasoline station located uphill from commercial property owned by the Ewin family at 3435 North Washington Boulevard in Arlington.

The lawsuit sought monetary damages and injunctive relief under the common law of Virginia for trespass and nuisance resulting from the discovery in June 1990 of 5.5 inches of free-floating gasoline in the groundwater under the Ewin property and, thereafter, the discovery of

substantial additional free-floating underground gasoline contamination located upgrade from the Ewin property which had not yet entered the property.[1]

Since 1964, the Ewin family had operated an automobile radiator and air conditioning repair business. Pursuant to a June 1990 lease and sale agreement, the family moved its business to Falls Church, Virginia. In September 1990, the lease and sale agreement was cancelled as a result of the discovery of the previously unknown gasoline contamination. The Ewin family was unable, because of the presence of the gasoline, to find a new tenant until June 1992, and then only at a significantly reduced rental.

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[1] Petitioners also raised state law claims of negligence and statutory torts which are not at issue here.

The Ewins' expert witnesses identified with reasonable scientific certainty the source of the underground gasoline contamination as five leaking 3000-gallon underground gasoline storage tanks located on the Exxon gasoline station property, which were 33 years old when they were removed by Exxon in November 1986.[2]

Defendant Exxon, with full knowledge of the easterly downhill movement of its underground gasoline, decided in 1987 not to undertake any remedial recovery or clean up. Instead, Exxon affirmatively acted to conceal from Virginia officials

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[2] Prior to Ewin family ownership in 1964, the property was operated briefly as a retail gasoline station. Although Exxon argued throughout that the gasoline contamination could have originated from other sources, the extensive discovery produced no other credible explanation for the 5.5 inches of free-floating gasoline found on the Ewin property in 1990.

and downhill property owners, including the Ewin family, the environmental injuries Exxon had set in motion.[3]

The Ewin family obtained evidence during the Arlington County proceedings that the five dangerous and defective Exxon underground gasoline storage tanks had discharged thousands of gallons of gasoline into the groundwater under the Exxon station from 1977 through November

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[3] In February 1992, the Virginia Department of Environmental Quality also determined that Exxon was the source of the underground gasoline. Despite repeated directives to Exxon to remediate its contamination, Exxon has failed to do so. Of course, mere clean up of the contamination will not make petitioners whole.

1986.[4] Petitioners learned during discovery that land and groundwater upgrade from their property currently contain gasoline contamination from the former Exxon property which continues to flow downhill onto petitioners' property. Each day some of the gasoline enters the Ewin family property for the first time as part of the groundwater movement. The ongoing gasoline contamination will continue in the future to damage petitioners' property.

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[4] Humble Oil and Refining Company, Exxon Company U.S.A.'s predecessor, purchased the land at 3444 North Washington Boulevard in 1969. Exxon, as owner, used the property continuously as a retail gasoline station, leasing it to William A. Perdue. Mr. Perdue purchased the gasoline station from Exxon in December 1986.

B.

Judge Paul F. Sheridan supervised pretrial proceedings in the Arlington County Circuit Court. Judge Sheridan denied Exxon's Demurrer and Exxon's Plea in Bar with respect to petitioners' claims of trespass and nuisance on December 10, 1992; he set the case for trial on March 9, 1993.

On March 9, 1993, the day set for the jury trial, Judge Benjamin Kendrick, without prior notice to petitioners of his intention to revisit Judge Sheridan's rulings, orally dismissed all petitioners' claims on the ground that they were time barred by the five-year limitation period of Virginia Code § 8.01-243. Judge Kendrick stated:

> THE COURT: . . . You can call it trespass. You can call it anything you want. This started in 1977. You've got a

> serious problem, counsel, and it's a harsh result. There is no question about it. That's the state of the law. I don't know how you are going to get around it.

Transcript of March 9, 1993, Hearing at 15.

Judge Kendrick continued: "Your cause of action started before the gas even got to your property. That's how harsh that rule is." Transcript of March 9, 1993, Hearing at 16.

Petitioners filed motions for reconsideration on April 9, 1993. They were heard on April 30, 1993, and Judge Kendrick orally denied petitioners' motions for reconsideration.

Judge Kendrick held that Virginia Code §§ 8.01-230 and 8.01-243 rendered all of petitioners' claims time barred because the five-year period for petitioners' claims began to run in 1977, the date of

the first documented discharge of gasoline from the Exxon property, prior to any entry of gasoline onto petitioners' property.

C.

The issues of denial of due process and equal protection under the Fourteenth Amendment of the Constitution of the United States were raised before Judge Kendrick on March 9, 1993, and again on April 30, 1993.[5] Counsel for petitioners requested the trial court, on April 30, 1993, to sign an order of dismissal which specifically incorporated reference to the

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[5] Petitioners also raised before Judge Sheridan the issue whether Virginia Code § 8.01-230 violated the due process and equal protection clauses of the United States Constitution in response to a motion for partial summary judgment, but the issue was not ruled upon because Judge Sheridan denied Exxon's motions on other grounds.

due process and equal protection claims. The trial court refused to do so stating:

> THE COURT: That might be the only way you're going to get relief from the obvious harshness of that statute and the ruling of this Court. But I'm signing [Exxon counsel's] order.

Transcript of April 30, 1993, Hearing at 12.

On May 21, 1993, Judge Kendrick entered his written final Order denying petitioners' motions for reconsideration. On May 25, 1993, petitioners timely filed their Notice of Appeal to the Virginia Supreme Court.

In their Petition for Appeal to the Virginia Supreme Court, petitioners squarely addressed their federal constitutional claims, along with numerous state law claims. The petition was timely

filed on July 20, 1993.[6] In an Order issued on November 3, 1993, the Virginia Supreme Court completely denied review of Judge Kendrick's brief orders, stating only "[t]he Court is of the opinion there is no reversible error in the judgment." On November 17, 1993, petitioners timely filed a Petition for Rehearing, which also raised their constitutional arguments. On

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[6] Question 5 of the Petition for Appeal states:

> The trial court erred in interpreting Virginia Code § 8.01-230 as barring plaintiffs' claims before any damage had occurred, thereby denying plaintiffs any remedy against defendants' unlawful taking of private property and, thus, violating plaintiffs' rights under the due process and equal protection clauses of the Constitutions of the Commonwealth of Virginia and the United States of America.

January 7, 1994, the Virginia Supreme Court denied the Petition for Rehearing.

ARGUMENT

The Petition for Certiorari should be granted because the Virginia court of last resort has decided an important question of federal law which has not been, but should be, settled by this Court. See Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988) and Mills v. Habluetzel, 456 U.S. 91 (1982). Virginia Code § 8.01-230 violates the due process clause of the United States Constitution by depriving petitioners of property without compensation or due process of law and without a full and fair opportunity to protect their property rights, in violation of Missouri Pacific Ry. Co. v. Nebraska, 164 U.S. 403, 417 (1896). Virginia Code § 8.01-230 is

inconsistent with well settled constitutional principles that apply to statutes of limitations. E.g., Terry v. Anderson, 95 U.S. 628, 632-633 (1877), cited in Texaco, Inc. v. Short, 454 U.S. 516, 527 n.21 (1982). In addition, the statute denies petitioners equal protection of the law, contrary to the teachings of Zobel v. Williams, 457 U.S. 55 (1982).

I.

Under Virginia law, it has been well settled that a statute of limitations does not begin to run until a right of action accrues, and damage or injury is an essential element of a right of action in tort or nuisance. Marshall v. Bird, 334 S.E.2d 573, 575 (Va. 1985); Locke v. Johns-Manville Corp., 275 S.E.2d 900, 904 (Va. 1981).

Whether petitioners possessed any property rights of which they could be deprived is determined by Virginia law. Board of Regents v. Roth, 408 U.S. 464, 577 (1972). Under Virginia law, petitioners, who own real estate on Washington Boulevard in fee simple, have a protectable property interest as a result of that ownership. The effect of the Virginia courts' interpretation of the statute in petitioners' case is to transfer to the owners of upgrade property a permanent easement to spill gasoline which will continue to contaminate petitioners' land. Petitioners' property rights are now encumbered by the right of respondents to pollute.

The landowners' right to exclude has traditionally been considered "one of the most essential sticks in the bundle of rights that are commonly characterized as

property." Loretto v. Teleprompter Manhattan CATC Corp., 458 U.S. 419, 433 (1982), citing Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (physical occupation of property is a taking). As there has been an actual physical invasion of petitioners' property in the nature of an easement, petitioners are the victims of a diminution of property rights and an illegal "taking" of property for private use of another, i.e., the owners of the Exxon property. Loretto, 458 U.S. at 441.

It is well settled that taking property from one individual for the private use of another individual violates due process. Missouri Pacific Ry. Co. v. Nebraska, 164 U.S. at 417 (citation omitted). It is similarly undisputed that Virginia could not directly take that property interest from petitioners for

public benefit without paying any compensation. Loretto, 458 U.S. at 435.

While Virginia could not take an easement in petitioners' land for itself without compensating petitioners, United States v. Causby, 328 U.S. 256, 261-262 (1946) (a physical invasion of only an easement in property is a taking), by means of the state statute of limitations the Virginia legislature has conveyed to the owners of the Exxon property such an easement to discharge gasoline onto petitioners' property. Petitioners are unable to recover for present and future invasion of their property rights or to require respondents to remove their gasoline from petitioners' property.

"A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be

void." Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 245 (1984). A statute which permits Virginia to do for the benefit of respondents what it cannot do for the public good of its own citizens, take a property right in the form of an easement from petitioners without compensation, deprives petitioners of their right to property in violation of the Fourteenth Amendment of the Constitution of the United States.

II.

A.

Petitioners also possess property interests protected by the Fourteenth Amendment's Due Process clause in the form of causes of action for nuisance and trespass. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982). This right of property cannot be taken away from

petitioners without due process of law. While Martinez v. California, 444 U.S. 277 (1980), holds generally that the action of a legislature in fashioning its own tort law would give all the process that is due, nevertheless, the individual citizen has a right to be protected from wholly arbitrary or irrational state action. Id. at 282. A statute that takes away a valuable right without being related to any legitimate government objective violates the Fourteenth Amendment. As interpreted by the Virginia courts and as applied to petitioners, the statute in question is wholly irrational and arbitrary.

B.

"Every government is under obligation to its citizens to afford them all needful remedies." Wilson v. Iseminger, 185 U.S.

55, 62 (1902). As Justice Brandeis observed:

> Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 682 (1930) (footnote omitted). The Fourteenth Amendment guarantees "the preservation of his substantial right to redress by some effective procedure." Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933). Where a statute of limitations would operate so as to bar all recovery without any allowance of time for the commencement thereof in futuro, it is usually deemed unconstitutional in its operation on

vested rights. See Terry v. Anderson, 95 U.S. at 632-633.

Statutes of limitations are valid exercises of state power. The Court has held that statutes of limitations are proper only when the injured party has adequate time for assertion of his rights. Atchafalaya Land Co. v. F. B. Williams Cypress Co., 258 U.S. 190 (1922). However, to be constitutional, the statute of limitation must provide a reasonable time for the commencement of an action. Terry v. Anderson, 95 U.S. at 632-633,

cited in Texaco v. Short, 454 U.S. at 527 n.21.[7]

The Virginia statute at issue violates petitioners' right to due process because Virginia law provides an inadequate period of time for filing suit. Where the statute was deemed to have run even before any injury was caused to the petitioners' property, petitioners

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[7] The Court raised the question of a limitation period too short to be constitutional in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988), but decided the case on other grounds. See dissent of Chief Justice Rehnquist, 485 U.S. at 494.

This Court noted in a challenge to a Texas statute of limitation, the period for asserting the right "must be sufficiently long to permit [interested persons] to bring an action." Mills v. Habluetzel, 456 U.S. at 97.

Appellant in Mills argued that the statute in question deprived illegitimate children of their right to support without due process of law. The Court ruled on equal protection grounds and did not reach the due process argument.

effectively had no opportunity to file suit, which is inadequate time as a matter of constitutional law. See Heath v. Sears, Roebuck & Co., 464 A.2d 288 (N.H. 1983).

C.

The Virginia court in this case, in effect, holds that the Virginia legislature redefined the elements of two ancient and venerable causes of action designed to protect property rights through the device of recodifying a statute of limitations. It holds that petitioners had a cause of action and should have filed their case before the gasoline reached their property and because they waited until their property was injured, they filed too late.

Under Virginia law, the unauthorized entry of gasoline contamination onto

petitioners' property without lawful authority and the resultant injury or damage to petitioners' real property is a trespass. Hampton Roads Sanitation Dist. v. McDonnell, 360 S.E.2d 841 (Va. 1987) (discharge of raw sewage onto plaintiff's property by a public sewage authority is a trespass). Here, the Virginia courts ruled that the statute of limitations ran before all of the elements of a traditional trespass were established.

Under Virginia law, the presence of gasoline contamination on petitioners' property constitutes a classic case of private nuisance, a threat to health and safety, which unreasonably interferes with the use and enjoyment of another's property and causes serious economic injury to petitioners' ability to lease or sell their property. City of Virginia Beach v. Murphy, 389 S.E.2d 462, 463 (Va.

1990), citing Newport News v. Hetzler, 221 S.E.2d 146, 150 (Va. 1976).

The Virginia courts have defined nuisance as a cause of action to protect the use and enjoyment of property. An essential element of the cause of action has always been that the petitioner's use and enjoyment of the property was impaired and there could be no nuisance without such impairment.

In an action to recover damages for a private nuisance, once the plaintiff proves the existence of the nuisance causing injury to property, it is immaterial whether the nuisance was created negligently or not. Thus, a breach of duty is irrelevant to a claim of nuisance. E.g., G.L. Webster Co. v. Steelman, 1 S.E.2d 305, 311 (Va. 1939).

Under the traditional and longstanding version of Virginia law,

petitioners' cause of action for nuisance would not arise until it could be proven that gasoline reached petitioners' property and "the injury can be shown." Id. at 314-315 (citation omitted); Blue Ridge Poultry & Egg Co., Inc. v. Clark, 176 S.E.2d 323, 326 (Va. 1970). See also American Locomotive Co. v. Hoffman, 61 S.E 759, 760 (Va. 1908) (cause of action for nuisance does not arise from construction of culverts and water gate on another's land, but only when plaintiff is damaged by water entering his land).

Here, the Virginia court ruled that the statute of limitations ran before all of the traditional elements of trespass and nuisance were established. Petitioners were thus deprived of undiminished property rights and their causes of action against respondents for the loss of those property rights.

D.

The statute, as applied to petitioners, fails to meet the test of being rationally related to a legitimate state end. The Virginia legislature is unlikely to have intended to change the state's substantive law through its 1977 codification of Virginia's statute of limitations. The Revisers' Note appended to § 8.01-230 in the Code of Virginia Annotated states:

> Section 8.01-230 retains the traditional rule of Virginia case law that a cause of action accrues when the wrongful act or breach of duty or contract occurs. In tort cases this has generally been construed to occur when injury or other damage takes place irrespective of when discovered.

The Virginia Supreme Court has interpreted the statute as creating a

distinct change in law for cases in which no compensable injury to property occurs until substantially after the breach of duty, and has decreed that the statute of limitations runs from the date of the breach of duty, not from the date of the later injury. Harbour Gate Owners Association, Inc. v. Berg, 348 S.E.2d 252 (Va. 1986).[8] The Virginia Supreme Court has observed: "It seems unlikely that the revisors intended the harsh result dictated by its clear language." Id. at 258 n.3.

Justice Stephenson of the Virginia Supreme Court stated in Keller v. Denny:

> To the extent that Code § 8.01-230 bars a cause of action before any damage has occurred, its

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[8] The statute as read literally would create a cause of action after the breach of duty but prior to the date any injury was sustained.

> application would deprive a person of property without due process of law in violation of the Federal and Virginia constitutions.

352 S.E.2d 327, 332 (1987) (emphasis in original) (citations omitted) (concurring).

Thus, no identifiable government objective is furthered by the change in § 8.01-230, as the drafters of the 1977 revision did not consider the implications of the change in language for nuisance and trespass cases in which the duty might be breached many years prior to the occurrence of damages.

Virginia may not extinguish or limit property rights in the absence of "a reasonable restriction designed to further legitimate legislative objectives." United States v. Locke, 471 U.S. 84, 104 (1985). The statute, as applied to

petitioners, fails the test of being rationally related to a legitimate legislative objective.[9] Zobel v. Williams, 457 U.S. 55 (1982). There is no rational basis for beginning the running of the statute of limitations prior to the existence of a cause of action for nuisance or trespass. Heath v. Sears, Roebuck & Co., 464 A.2d at 295. Since no legitimate state objective exists, this statute offends due process. Moore v. City of East Cleveland, 431 U.S. 494, 520 (1977) (Stevens, J., concurring), citing Euclid v. Ambly Realty Co., 272 U.S. 365 (1926).

As applied, Virginia Code § 8.01-230 is arbitrary and irrational. The statute

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[9] The failure of Exxon to advance any plausible or legitimate reason for the challenged distinction is sufficient to permit its invalidation. See Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978) (commerce clause).

does not advance the legitimate objectives of a statute of limitations. The trespass and nuisance claims of the petitioners were not stale. The gasoline to this day continues to run downhill to petitioners' property and into the Virginia waterways.[10]

Virginia has separately enacted legislation it calls a statute of repose designed to cut off all litigation after a certain number of years against such defendants as architects of buildings. Va. Code § 8.01-250. Because Virginia views its statute of repose as a narrowly defined exception to the general limitations law, Commonwealth v. Owens-Corning Fiberglas Corp., 385 S.E.2d 865

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[10] State and federal laws create a duty to remedy the source of the contamination. § 42 U.S.C. 699, et seq., and regulations promulgated thereunder, 40 C.F.R. Parts 280, 281 (1993); Virginia Code § 62.1-44.34:9(9) (1993 Supp.).

(1989), the state's limitations statutes as a whole cannot be read to provide that the legislature also intended to establish a date when downhill victims of gasoline contamination might be barred from suit in trespass or nuisance based on the date of the first uphill spill.

Moreover, justifications underlying a statute of repose do not apply here where the gasoline contamination continues its downhill trek to Virginia waterways. Although statutes of repose have often been upheld against constitutional challenges, the courts have upheld such statutes only when reasonable government

objectives have been articulated.[11] No such objectives have been articulated here.

Under well settled legal principles from which Virginia should not be deemed to depart unintentionally, no tort cause of action accrues until the victim actually suffers damages. There can be no legitimate state objective for beginning the running of the statute of limitations in nuisance and trespass cases prior to the existence of any injury. The legislature itself has not articulated any such end, and neither have the Virginia courts in their several opinions discussing the statute.

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[11] Statutes of repose have been upheld principally in products liability cases. See Alexander v. Beech Aircraft Corp., 952 F.2d 1215, 1224-1225 (10th Cir. 1991), and cases cited therein. We are unaware of any case applying a statute of repose to extinguish nuisance or trespass claims.

Finally, no Virginia legitimate state goals are advanced by the statute of limitations as applied to petitioners' situation. Such a provision favors only tortfeasors who discharge gasoline contamination.

This Court has upheld the power of a state to permit unused or abandoned interests in property to revert to another after the passage of time or to condition retention of property rights on the performance of reasonable conditions. Texaco, Inc. v. Short, 454 U.S. at 526 (legitimate state policies of encouraging development of potential mineral interests), citing Hawkins v. Barney's Lessee, 5 Pet. 457, 466 (1831) (landowner was not vigilant in asserting his rights). The Court has never permitted abridgement of substantial property rights against a party vigilant in asserting his rights

when the violation of the right continued even to the time of trial.

III.

The Due Process Clause of the Constitution of the United States provides that the state may not deprive a person of a property interest without providing notice and an opportunity for a hearing. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) (notice of dispute resolution mechanism and opportunity to be heard is required before service may be terminated by a public utility for failure to tender payment due); Fuentes v. Shevin, 407 U.S. 67 (1972) (notice and an opportunity to be heard before property is seized pursuant

to a prejudgment replevin order); Bell v. Burson, 402 U.S. 535 (1971) (notice and an opportunity to be heard before a driver's license is suspended for failure to post security after an accident); Cohoa v. Hernandez y Morales, 230 U.S. 139 (1913).

Virginia cannot authorize deprivation of petitioners' property rights without appropriate due process. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). Even if Virginia could eliminate causes of action for trespass and nuisance, the state would be required to give notice whether the property right is defined as a fee simple interest unencumbered by gasoline contamination or a cause of action in nuisance or trespass. Here, there was no notice and no opportunity for petitioners to take any action to protect their property rights.

A greater degree of state involvement is found here than in Texaco v. Short, 454 U.S. at 533-534, because Virginia law prevents petitioners from filing suit prior to invasion of their property by gasoline for the reason that the right of action has not yet accrued, and also prevents them from filing suit after the gasoline reaches their property on the ground that the statute of limitations has run. See Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988) (state involvement in probate).

IV.

The Equal Protection clause of the Fourteenth Amendment requires that all persons similarly situated be treated alike. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). Under the Equal Protection clause, there

are three standards which may be applicable in reviewing an equal protection challenge: strict scrutiny, intermediate scrutiny, and rational basis. Id. at 440-441.

Legislation that infringes a fundamental right must be examined under a strict scrutiny standard of review. Id. at 440; Harper v. Virginia State Board of Elections, 383 U.S. 663, 670 (1966) (right of franchise). Since the right to own and enjoy real property is a fundamental right, the Court should review petitioners' equal protection challenge under the strict scrutiny standard of review.

Even if the Court were to conclude that rational basis review is the appropriate standard, this statute, as applied to the discharge of gasoline, fails to "bear some rational relationship

to a legitimate state end." McDonald v. Board of Election, 394 U.S. 802, 809 (1969).

Equal protection is violated where harmful disparities in state treatment have no legitimate basis. Allegheny Pittsburgh Coal Co. v. Webster County, 488 U.S. 336 (1989); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985); Zobel v. Williams, 457 U.S. 55 (1982).[12]

At a minimum, the Equal Protection clause requires that legislation classify the persons it affects in a manner rationally related to a legitimate governmental objective. The classification scheme must "rationally advanc[e] a reasonable and identifiable

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[12] Dictum to the contrary found in New Orleans v. Dukes, 427 U.S. 297, 306 (1976), appears to have been superseded by the cases cited above. See Nordlinger v. Hahn, ___ U.S.___, 112 S. Ct. 2326 (1992).

governmental objective." Logan v. Zimmerman Brush Co., 455 U.S. at 439 (separate opinion by Blackmun, J.), quoting Schweiker v. Wilson, 450 U.S. 221, 235 (1981).

Since, as noted above, the drafters of the 1977 amendment did not intend to change the statute of limitations for trespass and nuisance when the duty was breached many years prior to any damages, the change in § 8.01-230 cannot be said to be rationally related to any legitimate government objective. See F.C.C. v. Beach Communications, Inc., ___ U.S. ___, 113 S. Ct. 2096, 2106 n.3 (1993) (Stevens, J., concurring in judgment).

No reasonable government objective is to be furthered in barring claims by property owners arising in trespass or nuisance resulting from underground pollution prior to their accrual or in

denying equal remedies to those property owners whose actions are time barred prior to their suffering any injury. The Commonwealth of Virginia has no legitimate interest in protecting persons discharging gasoline against petitioners' claims.

There is no rational basis for discriminating against a class of plaintiffs whose causes of action are time barred prior to their being injured by the presence of hidden underground gasoline contamination for the purpose of protecting underground polluters. Heath v. Sears, Roebuck & Co., 464 A.2d at 296 (N.H. 1983).

CONCLUSION

This case presents important due process and equal protection issues regarding the constitutionality of the Virginia statute, including the due

process issues which this Court left unresolved in Mills v. Habluetzel, 456 U.S. 91 (1982), and Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988). Citizens of Virginia are entitled to due process and equal protection as guaranteed by the Fourteenth Amendment. For these reasons, this Court should grant the Petition for Certiorari.

Respectfully submitted,

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